Filed 7/15/19 P. v. Marquez CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

LAZARUS DANIEL MARQUEZ,

Defendant and Appellant.

F076266

(Super. Ct. No. VCF322617)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Gary L. Paden, Judge.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Caely E. Fallini, Deputy Attorneys General, for Plaintiff and Respondent.

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In this appeal, Lazarus Daniel Marquez (defendant) challenges the sufficiency of the evidence supporting his multiple felony convictions. The main issue at trial was the identity of the offender. We conclude the victim's assured identification testimony, combined with strong circumstantial evidence, meets the substantial evidence test.

Defendant presents additional claims regarding the applicability of Penal Code section 654 and Senate Bill No. 620 (2017-2018 Reg. Sess.) (Senate Bill 620). As we will discuss, the section 654 claim is misguided. (All undesignated statutory references are to the Pen. Code.) The Senate Bill 620 claim has merit.

Senate Bill 620 gives trial courts discretion to strike firearm enhancements in the interests of justice, which the law did not permit at the time of defendant's sentencing. The parties agree the legislation applies retroactively, but they dispute whether allowing the trial court to exercise its discretion under the applicable statutes would be a futile act. We are persuaded the matter should be remanded to allow the trial court to consider whether to exercise its discretion to strike the firearm enhancements. Subject to this limited remand, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

On July 10, 2015, a woman (the victim) was carjacked and kidnapped outside of her home in Visalia. She had just entered her vehicle when a man appeared, opened the car door, pointed a gun at her head, and demanded her belongings. She handed over her purse and told him to take the car, but he instructed her to sit in the rear passenger seat opposite the driver's side. She complied, and he began driving the car.

The perpetrator drove the victim to a remote location in the country. She repeatedly asked to be let out of the car, but he shook his head no. The victim would later testify to having made a conscious effort to memorize distinguishing features of the man's appearance. As he held the steering wheel with his left hand, she noted the image of a diamond tattooed "on the webbing." The victim also saw "cursive tattoos on his arms," and she studied his facial features in the rearview mirror.

After about 15 minutes, the perpetrator stopped the car near Lover's Lane and Avenue 248. He looked through the victim's personal effects and remarked that he now knew her name, where she worked, and where she lived. She was warned to wait at least 24 hours before contacting the police or else he and his associates would "get" her. The

victim was then instructed to exit the car. The man drove away, leaving her stranded without any identification, money, or means of calling someone for help.

The victim eventually waved down a motorist and was given a ride to the Visalia police station. She described her abductor to police as a young Hispanic male with distinctive tattoos on his left hand, wrist, and forearm, further noting he had worn a red hat, a black "oversized" T-shirt, and khaki shorts. She estimated the man was in his "late twenties" and between five feet six inches and five feet eight inches in height.[1] Police used this information to create a photographic lineup of possible suspects, but the victim said none of them had the man's "narrow features, thin lips, pointy nose, and … light complexion."

The stolen vehicle was recovered in Bakersfield. The victim's credit card company informed her of an attempted purchase at a gas station in Oildale on the date of her abduction. Police obtained surveillance footage captured at the time of the transaction, which showed a man in a red hat, black shirt, and khaki shorts attempting to buy fuel. He was traveling in a white vehicle, but it was not the victim's car.

The victim conducted an independent investigation using social media. She reviewed numerous Facebook profiles, beginning with those of local individuals who she believed might associate with, or have connections to, "'thug[s]'" and "gangsters," which is how she perceived her abductor based on his appearance.[2] After hours of searching, the victim came across defendant's Facebook page and was confident he was the kidnapper. Despite being unable to confirm whether he had a tattoo on his left hand, she informed the police of her discovery. The police searched their own records and located

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[1]According to the record, defendant is Hispanic, five feet nine inches tall and was almost 22 years old at the time of the offense.

[2]This is a simplified summary of the victim's efforts. The record fully explains the methodology she employed, but those details are not essential to our resolution of defendant's claims.

a field interview card from March 2015, which documented a prior contact with defendant and the presence of a "diamond tattoo on [the] web of his hand, as well as the cursive writing." The victim was shown a new photographic lineup that included defendant's picture, which the police already had on file, and she positively identified him.

On August 14, 2015, police arrested defendant during a traffic stop of a white Hyundai Sonata owned by his girlfriend. During custodial interrogation, defendant denied ever having traveled to Bakersfield or Oildale. Defendant's cell phone data, which was obtained through a search warrant, showed his phone was in Visalia at the time of the kidnapping and then moved south into Bakersfield. In recorded jail calls, defendant spoke with his mother and his girlfriend about having gone to Bakersfield on the date of the incident.

Police interviewed defendant's girlfriend and showed her the surveillance footage from the gas station in Oildale. She identified the white car as her own and said the man standing next to it looked like her boyfriend. She had allowed defendant to use her car that day to run errands, which specifically included the purchase of gasoline.

Defendant's girlfriend worked in Visalia but was spending the summer at her sister's home in Bakersfield because the sister provided daycare for her children. The girlfriend worked a "graveyard shift," commuted back and forth on a regular basis, and "usually picked [defendant] up in the mornings." She did not pick him up on the morning of the crime, and he had sent her a message asking why she left him behind. To her surprise, he showed up at her sister's home later in the day. When she asked him how he got there, he cryptically replied, "[I] came up on a car." In a version of events told by the girlfriend's sister, defendant claimed to have taken a bus. The sister was skeptical of this explanation because there were no direct bus routes from Visalia to Bakersfield.

Defendant was prosecuted and brought to trial in May 2017. The People's evidence established the facts summarized above, plus the victim identified defendant on

the witness stand. The jury also learned the stolen vehicle had been found "around the corner" from the home of the girlfriend's sister.

Defendant was convicted of kidnapping during a carjacking (§ 209.5, subd. (a); count 1), assault with a firearm (§ 245, subd. (a)(2); count 2), carjacking (§ 215, subd. (a); count 3), kidnapping (§ 207, subd. (a); count 4), second degree robbery (§§ 211, 212.5, subd. (c); count 5), witness dissuasion by means of force or fear (§ 136.1, subds. (b)(1), (c)(1); counts 6 & 7), and identity theft (§ 530.5, subd. (a); count 8). Counts 1 and 3–5 included firearm enhancements under section 12022.53, subdivision (b). Count 2 included a firearm enhancement under section 12022.5, subdivision (d). Counts 6 and 7 included firearm enhancements under section 12022.5, subdivision (a).

As punishment for count 1, defendant was sentenced to an indeterminate prison term of life plus 10 years. Sentencing on the remaining counts resulted in a consecutive aggregate determinate term of 20 years 4 months. Relevant to the issues on appeal, the trial court imposed consecutive terms for both witness dissuasion convictions.

DISCUSSION

I. Sufficiency of the Evidence

Defendant claims there was insufficient evidence to prove the element of identity. In essence, he argues witness identifications are unreliable and cannot support a guilty verdict unless corroborated by "forensic evidence." The law provides otherwise.

The standard of review for a claim of insufficient evidence is deferential to the verdict. (*People v. Lochtefeld* (2000) 77 Cal.App.4th 533, 538.) "[T]he reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.) We do not substitute our own interpretation of the record in place of the jury's determinations

regarding witness credibility and issues of fact. (*People v. Jones* (1990) 51 Cal.3d 294, 314; see *People v. Elwood* (1988) 199 Cal.App.3d 1365, 1372 ["Purported weaknesses in identification testimony of a single eyewitness are to be evaluated by the jury"].)

"Identification of the defendant by a single eyewitness may be sufficient to prove the defendant's identity as the perpetrator of a crime. [Citation.] Moreover, a testifying witness's out-of-court identification is probative for that purpose and can, by itself, be sufficient evidence of the defendant's guilt …." (*People v. Boyer* (2006) 38 Cal.4th 412, 480; accord, Evid. Code, § 411 ["Except where additional evidence is required by statute, the direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact"].) "'The strength or weakness of the identification, the incompatibility of and discrepancies in the testimony, if there were any, the uncertainty of recollection, and the qualification of identity and lack of positiveness in testimony are matters which go to the weight of the evidence and the credibility of the witnesses, and are for the observation and consideration, and directed solely to the attention of the jury in the first instance ….'" (*People v. Mohamed* (2011) 201 Cal.App.4th 515, 522.) For a reviewing court to set aside a guilty verdict on the basis of a questionable identification, "'the evidence of identity must be so weak as to constitute practically no evidence at all.'" (*Id*. at p. 521.)

Defendant relies on a frequently cited passage from *United States v. Wade* (1967) 388 U.S. 218, 228: "The vagaries of eyewitness identification are well-known; the annals of criminal law are rife with instances of mistaken identification." The statement is as true today as it was five decades ago. However, "vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt" exist to prevent convictions based on mistaken identity. (*Perry v. New Hampshire* (2012) 565 U.S. 228, 233.)

The victim confidently identified defendant as the offender, and her testimony was corroborated by independent evidence. Defense counsel challenged the reliability of her

testimony via cross-examination and in closing argument, and the jury was instructed on the relevant principles (e.g., CALCRIM Nos. 220 [Reasonable Doubt] & 315 [Eyewitness Identification]). When the issue of reliability is explored at trial and the eyewitness testimony is believed by the trier of fact, the identification will be accepted on appeal as supported by substantial evidence. (See *People v. Young* (2005) 34 Cal.4th 1149, 1181 ["unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction"].) Such is the case here.

II. Section 654

The trial court imposed consecutive sentences for counts 6 and 7 based on defendant's repeated threats to harm the victim if she did not wait at least 24 hours before contacting the police. Defendant now alleges a violation of section 654, arguing punishment for count 7 should have been stayed. We find no error.

Section 654 provides in relevant part: "An act or omission that is punishable *in different ways by different provisions of law* shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." (*Id.*, subd. (a), italics added.) The statute bars extra punishment for a single act or indivisible course of conduct that may constitute the commission of multiple crimes. "Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the 'intent and objective' of the actor. [Citation.]" (*People v. Cleveland* (2001) 87 Cal.App.4th 263, 267.)

Defendant's arguments focus on his singular objective of dissuading the victim from reporting his crimes. The claim is fatally flawed because, as parts of his briefing acknowledge, section 654 only applies to conduct punishable under multiple criminal statutes. "By its plain language section 654 does not bar multiple punishment for

multiple violations of the same criminal statute." (*People v. Correa* (2012) 54 Cal.4th 331, 334.) Counts 6 and 7 alleged separate violations of the same provision of the Penal Code, i.e., section 136.1, subdivisions (b)(1) (prohibiting the act of dissuasion) and (c)(1) (providing for a longer sentence when the act is accompanied by force or threat of force/violence). Therefore, the trial court did not err by imposing punishment for each violation of the statute. (*Correa*, at p. 344 ["section 654 does not govern multiple punishment for violations of the same provision of law"].)

III. Senate Bill 620

Effective January 1, 2018, Senate Bill 620 amended sections 12022.5 and 12022.53. (Stats. 2017, ch. 682, §§ 1, 2.) Pursuant to those amendments, trial courts may, "in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed …." (§§ 12022.5, subd. (c), 12022.53, subd. (h).) The parties agree Senate Bill 620 applies retroactively to all nonfinal judgments. Absent evidence to the contrary, it is presumed the Legislature intended an amended statute reducing the punishment for a criminal offense to apply retroactively to defendants whose judgments are not yet final on the statute's operative date. (*People v. Brown* (2012) 54 Cal.4th 314, 323; *In re Estrada* (1965) 63 Cal.2d 740, 745.) Therefore, we accept the parties' position on the issue of retroactivity. (Accord, *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091; *People v. Robbins* (2018) 19 Cal.App.5th 660, 678–679.)

The parties dispute the propriety of a hearing to allow the trial court to consider exercising its discretion to strike one or more of the firearm enhancements. The People argue a remand would be futile given the unlikelihood of any further leniency. Several appellate courts have adopted the following standard:

> "Remand is required unless the record reveals a clear indication that the trial court would not have reduced the sentence even if at the time of sentencing it had the discretion to do so. [Citation.] Without such a clear

> indication of a trial court's intent, remand is required when the trial court is unaware of its sentencing choices." (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110; accord, *People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.)

Defendant's reply brief notes the trial court was disinclined to impose the maximum aggregate sentence because defendant "doesn't have much of a prior record." This weighs against the People's futility argument. Whatever the probabilities of a different result, the prudent course of action is to give the trial court an opportunity to exercise its authority under the new laws. (See *People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 426; cf. *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, 1896 [declining to remand where trial court had "stated that imposing the maximum sentence was appropriate" and called the defendant "'the kind of individual the law was intended to keep off the street as long as possible'"].)

DISPOSITION

The matter is remanded to the trial court to exercise its discretion under sections 12022.5, subdivision (c), and 12022.53, subdivision (h) as amended by Senate Bill 620 and, if appropriate following exercise of that discretion, to resentence defendant accordingly. In all other respects, the judgment is affirmed.

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PEÑA, J.

WE CONCUR:

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FRANSON, Acting P.J.

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DESANTOS, J.